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No. 88-8

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH P. FERRY, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner is entitled to attorney fees under the Equal Access to Justice Act for his attorney's services before the Merit Systems Protection Board.

2. Whether he is entitled to an award under 5 U.S.C. 7701(g)(1) for such services.

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OPINIONS BELOW

The opinion of the court of appeals affirming the Merit Systems Protection Board's denial of attorney fees (Pet. App. 1-4) is unreported. The Administrative Judge's opinion denying fees (Pet. App. 7-20; 846 F.2d 78 (Table); 34 M.S.P.B. 362 (Table)) is also unreported, as is the Board's opinion denying a petition for review of that decision (Pet. App. 5-6). The opinion of the court of appeals at the merits stage (Pet. App. 42-47; 785 F.2d 322 (Table)) and the agency opinions on the merits (Pet. App. 21-28 (34 M.S.P.B. 362 (Table)) Pet. App. 29-40, 48-73 (26 M.S.P.B. 422)) are similarly unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1988, and the petition for a writ of certiorari was filed on Monday, June 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was removed from his position as Machine Tool Operator by the Department of the Navy on May 5, 1984, for excessive unauthorized absence and failure properly to notify his employer of the reasons for his absence (Pet. App. 29). Petitioner appealed the agency action to the Merit Systems Protection Board (MSPB), seeking to have the agency's decision overturned and to be retroactively restored to his former position (*id.* at 48). Before the presiding official, the agency presented evidence that petitioner was injured on the job on June 1, 1983, and that, although he provided the necessary leave applications and medical certifications for the period from his date of injury through September 19, 1983, he failed, despite agency requests that he do so, to submit such documentation for the period from September 20 until he returned to work on March 7, 1984 (*id.* at 52-56). The presiding official found the charges of excessive unauthorized absence and failure properly to notify the agency of the reasons for such absence sustained by a preponderance of the evidence and affirmed the agency action (*id.* at 63, 71). On January 15, 1985, the full MSPB denied petitioner's petition for review of this determination.

Petitioner petitioned the United States Court of Appeals for the Federal Circuit for review. In his reply brief, petitioner brought to the attention of the court a decision of the Department of Labor, issued subsequent to the Board decision, granting him disability until January 23, 1984,

when the Department of Labor concluded that he was medically qualified to resume full employment (Pet. App. 44). In a decision issued on October 29, 1985, the court vacated the MSPB's decision and remanded the case to the Board for reconsideration in light of the Labor Department's ruling (*id.* at 42-43). Also, while the court noted that it was clear that petitioner had been given direct instructions that he must provide written justification and medical certification for his absence, the court found it unclear whether formal regulations requiring such documentation were in effect at the pertinent time (*id.* at 45-46). The court accordingly instructed the Board to determine the effect, if any, of the uncertainty about the status of the regulations (*id.* at 46).

On remand, the parties stipulated that, in light of the new Department of Labor decision, petitioner was not absent without leave during the period before January 23, 1984, and, consequently, the presiding official found this part of the charges not to be sustained (Pet. App. 32). The presiding official, however, sustained the charges that petitioner was absent without leave from January 24, 1984, through March 6, 1984, and had failed to notify his employer of the reasons for his absence (*id.* at 32-33). The issue of whether petitioner violated official regulations was withdrawn from consideration by stipulation, so the presiding official did not discuss it (*id.* at 33). Pursuant to a further stipulation of the parties, the Board substituted an eight-day suspension for the removal action (*id.* at 34-37).

2. Petitioner submitted a motion to the MSPB for attorney fees for work before the agency and in the court of appeals, relying primarily on 5 U.S.C. 7701(g)(1), and also mentioning the Equal Access to Justice Act (EAJA) (Pet.

App. 95).[1] The presiding official denied the motion (*id.* at 7-20). Applying the standards adopted by the MSPB in *Allen* v. *United States Postal Service,* 2 M.S.P.B. 582 (1980), he concluded that an attorney fee award would not be in the interest of justice, the criterion for an award under 5 U.S.C. 7701(g)(1).

The presiding official noted (Pet. App. 12) that under *Allen,* a "substantially innocent" prevailing party is entitled to a fee award (2 M.S.P.B. at 593), but since petitioner's intentional failure to supply the agency with the medical information it requested resulted in a removal decision made without "full knowledge of the relevant facts" (Pet. App. 16), he was not substantially innocent. See *Wise* v. *MSPB,* 780 F.2d 997 (Fed. Cir. 1985).[2] The presiding official further concluded that petitioner "committed a substantial offense and received [an] eight-day penalty. I cannot conclude from this record that the 'interest of justice' demands the agency now pay his attorney fees" (Pet. App. 19).

The MSPB denied a petition for review of the fee decision (Pet. App. 5-6), and the court of appeals affirmed (*id.* at 1-4). In the court of appeals petitioner did not assert any entitlement under EAJA, and that court accordingly considered only the applicability of 5 U.S.C. 7701(g)(1). The court concluded (Pet. App. 3) that petitioner's intentional

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[1] Although petitioner referred in passing to EAJA in his motion, which is reproduced in full at Pet. App. 93-101, the motion based the claim of entitlement on an asserted compliance with the standards governing an award under 5 U.S.C. 7701(g)(1). Indeed, petitioner even gave an incorrect statutory citation for EAJA.

[2] The presiding official also rejected petitioner's argument that attorney fees should be awarded (1) because the agency prolonged the proceedings after the Department of Labor finding, and (2) because the agency committed harmful procedural error in asserting a violation of agency regulation (Pet. App. 17-18).

refusal to provide his agency with the required documentation to justify his absence was "fatal to his claim of substantial innocence" and noted that "petitioner was not vindicated of the charge of AWOL. His suspension was for the efficiency of the service. Petitioner has so stipulated. This is too weak a reed on which to hang a claim for attorney fe[e]s in the interest of justice, especially absent any finding by the MSPB of bad faith or harmful procedural error in the suspension penalty on the part of the United States" (*id.* at 4).

ARGUMENT

1. Petitioner asserts that this case presents a conflict in the circuits over the extent of the applicability of EAJA to agency proceedings. Petitioner, however, failed to press his claim for EAJA fees before the agency, and totally failed to present it to the court of appeals. It would be inappropriate for this Court to consider that claim in the first instance. *Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 362 (1981); *United States* v. *Mendenhall,* 446 U.S. 544, 551 n.5 (1980).

In any event, petitioner would not be entitled to EAJA fees for work at the agency level under the plain terms of the statute, and the conflict he relies on, which is of no continuing importance, is not involved in this case. EAJA authorizes the award of attorney fees for work performed in agency "adversary adjudication," which is defined (5 U.S.C. (& Supp. IV) 504(c)) as an adjudication "under Section 554 of this title" (5 U.S.C. (& Supp. IV) 504); Sectino 554 in turn expressly excludes adjudications that involve the "tenure of an employee." There is thus clearly no authority under 5 U.S.C. 504 for the MSPB to award attorney fees for work performed at the agency level. *Gavette* v. *OPM,* 808 F.2d 1456, 1461 (Fed. Cir. 1986) (en banc); *Hoska* v. *Department of the Army,* 694 F.2d

270, 273 (D.C. Cir. 1982). There is a disagreement between the Federal and District of Columbia Circuits about the scope of *another* section of EAJA, 28 U.S.C. (& Supp. IV) 2412, which pertains to the award of attorney fees for work before the courts. Although the court in *Hoska* concluded that the "employee tenure" exception also bars the award of fees for services on judicial review of agency personnel decisions, the Federal Circuit disagrees. *Gavette* v. *OPM,* 808 F.2d at 1462-1463 (distinguishing between awards for work at agency level and in judicial proceedings).[3] That disagreement, however, is not of continuing significance since the Federal Circuit now has exclusive jurisdiction over all appeals from MSPB decisions in cases such as this one (28 U.S.C. 1295(9)). It is, in any event, not involved in this case, because petitioner's EAJA claim was at most solely for fees for his attorney's work at the agency level, not for fees incurred on judicial review.[4]

2. Petitioner's request for attorney fees was thus correctly considered only under 5 U.S.C. 7701(g)(1), which provides that the MSPB "may require payment by the agency involved of reasonable attorney fees incurred by an employee * * * if the employee * * * is the prevailing party

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[3] In *Miller* v. *United States,* 753 F.2d 270, 275 (3d Cir. 1985), the court, citing Section 2412, awarded fees for work performed before the MSPB. In a subsequent unpublished order (at 1) entered in that case on June 11, 1985, however, the court reconsidered the statutory basis for its award, and stated that its award "must be in accordance with the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii), instead of the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(3)." (We are filing a copy of this order with the Clerk of this Court.) Thus, the Third Circuit agrees that no EAJA fees may be awarded either by the court or the agency for work before the agency.

[4] Petitioner further suggests (Pet. 31-35) that the circuits are in conflict over the EAJA "substantial justification" standard. That conflict was resolved by this Court in *Pierce* v. *Underwood,* No. 86-1512 (June 27, 1988).

and the Board * * * determines that payment by the agency is warranted in the interest of justice." [5] This statutory standard clearly leaves wide discretion to the Board in determining when a fee is appropriate. Indeed, although the Senate Report on the Civil Service Reform Act of 1978, of which Section 7701 is a part, noted that fees were to be awarded when "the agency's action was taken in bad faith," as when the action is "wholly unfounded" or is designed "to harass" or "exert improper pressure" on the employee, that report also emphasized that "[t]he circumstances justifying the award of attorney's fees [are] left to the discretion of the Board to develop in light of its experience." S. Rep. 95-969, 95th Cong., 2d Sess. 61 (1978).

In *Allen* v. *United States Postal Service,* 2 M.S.P.B. at 592-593 (footnote omitted), the MSPB attempted to "provide prospective guidance by summarizing here circumstances * * * which may warrant fee awards," emphasizing that the summary was "not exhaustive, but illustrative. Nor is it a * * * litmus paper test[ ] for award or denial of attorney fees." [6] Following the Board's guidance in

[5] Attorney fees can also be awarded by an "appropriate authority" under the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii). The MSPB is such an authority, 5 C.F.R. 550.803, 550.806 (1986). The criteria for awarding attorney fees under 5 U.S.C. 5596 and 7701(g)(1) are identical. *Sims* v. *Department of the Navy,* 711 F.2d 1578 (Fed. Cir. 1983).

[6] The MSPB's summary of circumstances where fees should be awarded stated (2 M.S.P.B. at 593 (footnotes and citations omitted)):

> 1. Where the agency engaged in a "prohibited personnel practice";
>
> 2. Where the agency's action was "clearly without merit" or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
>
> 3. Where the agency initiated the action against the employee in "bad faith," including:
>
> a. Where the agency's action was brought to "harass" the employee;

Allen—which the Federal Circuit approved in *Sterner* v. *Department of the Army*, 711 F.2d 1563 (1983)—the presiding official concluded that an attorney fee award to petitioner was not appropriate in the interest of justice. That decision is clearly correct. The substantial suspension penalty, to which petitioner stipulated, showed that the agency action was far from "wholly unfounded" or taken in bad faith. Nor was there anything approaching a "gross procedural error," "a prohibited personnel practice" or a proceeding brought where success on the merits was not to be anticipated. The MSPB found it unnecessary to review the presiding official's factbound decision, and the court of appeals affirmed. There is clearly no need for further review.

Petitioner asserts that the court of appeals erred in concluding that because petitioner was not substantially innocent, there was no need to consider any of the other bases upon which a fee award might be justified (Pet. 39-40). But petitioner's characterization of the court's decision is inaccurate; the court noted that petitioner had conceded that his suspension was proper, and that there was no showing of bad faith or harmful procedural error in imposing the suspension. Thus, the court did consider the other *Allen* factors. As petitioner himself notes, the Federal Circuit has not, in other cases, found the "substantial innocence" standard dispositive. It did not do so here.

Petitioner's alternative claim (Pet. 40-41) that the "substantial innocence" standard has not been consistently in-

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b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;

5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

terpreted reduces to the claim that in other cases involving different factual situations, employees have been found to be substantially innocent.[7] That is not sufficient to suggest that inconsistent standards are being applied.[8] In any event, petitioner's claim involves at most an inconsistency within the Federal Circuit in reviewing MSPB claims, which is a matter for that court, not this one, to resolve.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioner's summary of his situation (Pet. 44, 46-47) overlooks the fact that the administrative judge found that he "did not supply the requested medical information" (Pet. App. 16), and rejected his claim that he had supplied it to the agency personnel office (*id.* at 61-63).

[8] For the same reason, there is no merit in petitioner's suggestion that the Federal Circuit has been inconsistent in determining when agency charges are groundless and when an agency knew or should have known it would not prevail on the merits (Pet. 49-56).

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